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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARY FUDGE, et al., Plaintiffs and Respondents, v. ONE FORD ROAD COMMUNITY ASSOCIATION, Defendant and Appellant.	G042298 (Super. Ct. No. 07CC12663) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Epsten Grinnell & Howell, Rian W. Jones and Carrie M. Timko for Defendant and Appellant.

McNeil, Tropp, Braun & Kennedy, Craig P. Kennedy and Frank C. Cracchiolo for Plaintiffs and Respondents.

One Ford Road is a common interest development in Newport Beach governed by the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350, et seq.). The community is managed by the One Ford Road Community Association (the Association), which is governed by a board of directors (the Board), and is subject to a recorded declaration of conditions, covenants, and restrictions (the CC & Rs). The development is comprised of single family homes almost all of which were built by the original developer prior to individual lots being conveyed to their owners.

Gary Fudge acquired one of the few undeveloped custom home lots within One Ford Road. After the Association began demanding Fudge install landscaping on the vacant lot, and assessing fines against him for his failure to do so, Fudge filed this action against the Association.[1] He sought a declaration the provision in the CC & Rs requiring landscaping be fully installed within 180 days of acquiring title did not apply until a house was built on the lot. The trial court agreed. The Association appeals contending the trial court erroneously interpreted the CC & Rs. We reject its contentions and affirm the judgment.

FACTS AND PROCEDURE

Original Development of Completed Residences

The One Ford Road development consists of approximately 370 residential lots developed by Pacific Bay Properties (Pacific). The CC & Rs were recorded in March 1998. Pacific's development plan was to only sell fully built residences and from 1997, when lots were originally offered for sale, until December 2001, the hundreds of lots sold all had completed houses on them prior to sale.

Section 3.2 of the CC & Rs, the provision at issue in this case, requires once a lot was transferred, its new owner was required to timely install landscaping. The

[1] The Plaintiffs and Respondents are Gary Fudge, individually and as Trustee of the Gary A. Fudge Trust Dated January 27, 1997, are hereafter referred to collectively and in the singular as Fudge.

provision requires, "Landscaping. Every Owner shall be responsible for landscaping his or her Lot with trees, plant materials, ground cover, decorative rocks and/or other walkways or hardscapes to be in conformity and harmony with the external design of the Residences and the general plan established by this Declaration for the Property. All landscape plans submitted by each Owner must provide that all water drainage from downspouts shall be transported to the street through a satisfactory water collection system. Every Owner shall not later than ninety (90) days after conveyance of the Lot to Owner prepare and submit to the Architectural Committee, a landscape plan for the Lot (unless such deadline is extended . . . .) . . . Every Owner shall landscape the front, back and side yard areas within his or her Lot in accordance with the [landscape plans approved by the Architectural Committee] . . . within the later to occur of (i) [180] days of conveyance of the Lot to Owner or (ii) [60] days after Architectural Committee approval (unless such deadline is extended . . .) Every Owner shall maintain the landscaping on his or her Lot in a sightly [*sic*] and well-kept condition including, but not limited to, keeping the landscaping free of all weeds, trash or other debris and regularly mowing all lawns."

Undeveloped Lots are Sold

In May 2001, six very large custom home sites on Troon Drive, including the one eventually acquired by Fudge (the Subject Lot) were added to the One Ford Road development. The recorded declaration subjecting the Troon Drive lots to the CC & Rs indicated Pacific intended to develop those lots with completed residences as well. But in late 2001, Pacific decided to sell the Troon Drive lots undeveloped. They were the only lots in One Ford Road sold by Pacific without homes already built upon them.

The CC & Rs did not contain any requirements for a residence to be built on undeveloped lots within a given timeframe. But five of the six Troon Drive custom lots were conveyed subject to a deed restriction by Pacific requiring the purchaser to commence home construction within 18 months of acquiring title and obtain a certificate

of occupancy within 48 months. But the Subject Lot, which was approximately 35,000 square feet, was sold to Pacific's part-owner and president, John Markley, on December 27, 2001, without any deed restriction.

In May 2003, Markley sold the undeveloped Subject Lot. The Subject Lot was subsequently transferred two more times, until being conveyed to Fudge in March 2006.

Fudge bought the Subject Lot intending to build on it an approximately 10,000 square foot home. Based on his experience in building smaller homes for himself, he anticipated the house would take at least a year or more to design and another year and a half to two years to build.

In June 2006, less than three months after Fudge purchased the Subject Lot, the Association sent Fudge a letter advising him that pursuant to section 3.2 of the CC & Rs he must submit landscaping plans and complete landscape installation on the property within 180 days of when he took title to the Subject Lot. In November 2006, the Association told Fudge he could have nine additional months to submit building and landscape plans for the Subject Lot, plus another nine months to complete construction of a residence and installation of all landscaping. Sometime in early 2007, the Association began assessing monthly fines against Fudge, totaling $25,000 by February 2009, because he failed to install landscaping on his vacant lot.

Complaint

Fudge filed the instant action against the Association for declaratory and injunctive relief in December 2007. He sought a declaration that section 3.2 of the CC & Rs did not require landscaping be installed prior to construction of a residence upon the lot. Fudge requested an injunction prohibiting the Association from assessing fines against him for failing to install landscaping on the vacant lot.

Trial

At trial, Fudge presented evidence that during the two years that Markley owned the Subject Lot, he never submitted home construction plans or landscaping plans to the Association for approval, nor was he ever requested to do so. During the next three years, none of the two interim owners submitted building or landscape plans for the Subject Lot to the Association, or were ever requested by the Association to do so.

Fudge testified he learned from a landscape architect it would be extremely expensive to fully landscape the vacant Subject Lot, which would require grading and irrigation work, all of which would have to be removed for construction. Even covering the 35,000 square foot lot with sod would be very expensive and would require approximately one million gallons of water a year to maintain.

Fudge introduced evidence that no other Troon Drive lot owner was forced to install landscaping prior to construction of a residence and each Troon Drive lot had a history of lengthy development times. One Troon Drive lot sold in February 2002, construction permits were issued in March 2004, construction completed in January 2006, and landscape was installed after completion; another lot sold in December 2002, a building permit was issued in August 2003, construction completed December 2004, and landscaping installed thereafter; another lot was sold in August 2002, by March 2006, construction was underway, but landscaping was not installed; the fourth lot was sold in January 2002, a building permit was issued in February 2004, and landscaping was not installed until after completion of construction; and the fifth lot was sold in December 2002, was still undeveloped and unlandscaped in March of 2006, when Fudge acquired the Subject Lot.

An attorney specializing in common interest subdivision law testified as an expert for Fudge that section 3.2 of the CC&Rs was a common provision for developments that had completed homes built upon them when sold but was not appropriate for the sale of custom lots.

The president of the Association's Board, who was a Board member when Fudge bought the Subject Lot, testified that after Fudge acquired the Subject Lot, the Board concluded Fudge was not going to build upon it because he had not submitted any plans. The Board was concerned about the effect of a vacant lot on the value of other properties and concerned that dirt and dust could blow off the Subject Property and impact other properties.

On February 27, 2009, shortly before trial began, escrow closed on Fudge's sale of the Subject Lot. The Association demanded the escrow holder reserve the total fines it has assessed against Fudge. Accordingly, the trial court found there continued to be a justiciable controversy.

Statement of Decision and Judgment

After a bench trial, the court issued a statement of decision finding in Fudge's favor as follows: "A) The uncontroverted evidence has demonstrated that when One Ford Road was in its infancy, it was its developer's plan that all of the lots in the planned development would be sold with homes already erected on them. It was only fairly late in the development of One Ford Road—well after the CC & Rs were recorded that custom home sites (i.e. bare lots, such as the Subject [Lot]), were marketed. B) The provision itself speaks to landscaping around homes which have been built. If the provision were intended to include home sites, there would not have been any reference to walkways, hardscapes, downspouts, and front, back and side yards. Any ambiguity in the language (e.g. a reference to a "Lot," defined elsewhere in the CC & Rs without mention of a house thereon), is due to the fact that there were no custom home sites contemplated for sale when the CC & Rs were recorded. C) It makes no sense to put in landscaping before a home is substantially completed, as much, or all, of the landscaping would have to be removed in the process of construction. Moreover, as uncontroverted testimony has shown, it takes far longer to design and erect a custom home than Section 3.2's time limits for installing landscaping. Thus, the time limits are

unreasonable as applied to a custom home site. D) The uncontroverted testimony of [the attorney expert witness], which the court accepts, is that a provision such as Section 3.2 is intended for homeowners associations where completed homes, and not custom lots, are sold. E) The Subject Lot was the only custom home site sold without a proviso that a home must be built thereon within a certain period of time. As [the expert witness] testified, again without evidence to the contrary having been offered by [the Association], the absence of such deed restriction manifested the seller's intent that the lot be unencumbered by such time restriction. F) The conduct of defendant vis-à-vis the Subject Lot and other custom lots also speaks volumes about the applicability of Section 3.2 to the Subject Lot. Uncontroverted evidence shows that none of the prior owners of the Subject Lot was asked by [the Association's] Board of Directors to install landscaping prior to the completion of a residence and no lot in One Ford Road was landscaped prior to completion of a residence. Some homes took years to build, and apparently at least one home has not yet been completed, about 10 years after the lot was sold. The [Association's] efforts to obtain compliance from . . . Fudge by imposing fines appears to violate the rule that a homeowners association must act in good faith and must enforce the CC & Rs in a fair [and] uniform manner (*Nahrstedt vs. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 383 [(*Nahrstedt*)].) [¶] Having determined that Section 3.2 of the CC & Rs is inapplicable to the Subject Lot, the court finds that the fines imposed on [Fudge] by [the Association] had no lawful basis. Judgment is given in favor of [Fudge] and against [the Association] as follows: The court declares that Section 3.2 of the CC & Rs does not apply to the Subject Lot and that the fines imposed by [the Association] are unfounded and inappropriate. The court further finds that though . . . Fudge no longer owns the Subject Lot, there is still a justiciable controversy inasmuch as defendant has continued to assert a claim for the recovery of fines assessed under the auspices of Section 3.2 of the CC & Rs having made a demand in escrow for

recovery of the fines from . . . Fudge's sales proceeds." The court subsequently entered judgment in Fudge's favor, awarding him costs and attorney fees.

DISCUSSION

The Association contends the trial court erroneously interpreted section 3.2 of the CC & Rs. It contends the court's conclusion section 3.2 does not require landscaping be installed on a lot until a residence has been built thereon is inconsistent with both the rules of contract interpretation and the laws governing enforcement of equitable servitudes. We disagree.

The parties generally agree the interpretation of CC & Rs is governed by the rules for interpreting contracts (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 575; *White v. Dorfman* (1981) 116 Cal.App.3d 892, 897), and the trial court's ruling is subject to de novo review (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121 (*Ekstrom*)).

CC & Rs "must be 'construed as a whole' so as 'to give effect to every part thereof [citations], and particular words or clauses must be subordinated to general intent.' [Citations.]" (*Ezer v. Fuchsloch* (1979) 99 Cal.App.3d 849, 861.) "As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.]" (*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730 (*Ticor*).) Extrinsic evidence cannot "change the patent language of the [CC & R's]." (*White v. Dorfman, supra,* 116 Cal.App.3d at p. 899.) But "[t]he CC & Rs, enacted for the mutual benefit of all . . . homeowners, are 'to be interpreted so as to give effect to the main purpose of the contract . . . [and] where a contract is susceptible of two interpretations, the courts shall give it such a construction as will make it lawful, operative, definite, reasonable and capable of being carried into effect . . . [and] avoid an interpretation which will make the CC & Rs extraordinary, harsh, unjust, inequitable or which would result in absurdity.' [Citation.]" (*Battram v. Emerald Bay Community Assn.* (1984) 157 Cal.App.3d 1184, 1189.)

"A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean. For this reason, evidence of such conduct . . . is admissible to resolve ambiguities in the contract's language. [Citation.]" (*City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393 (*City of Hope*).) "Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties." (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444-445 (*Hannula*).)

The Association argues the only reasonable interpretation of section 3.2 of the CC&Rs is that it applies to *all* lots in the One Ford Road development and requires *all* lots be fully landscaped within 180 days of acquisition, regardless of whether the lot was sold with a completed house thereon, or was sold as a vacant lot. We disagree.

We consider first the language of section 3.2, and agree with the trial court that on its face it contemplates landscaping to be installed around a completed house, not landscaping to be installed on vacant lots. Section 3.2 requires that within 180 of acquiring title, the purchaser must landscape the "front, back and side yard areas" of his or her lot "with trees, plant materials, ground cover, decorative rocks and/or other walkways or hardscapes . . . ." The landscaping must be "in conformity and harmony with the external design of the Residences[,]" and "all water drainage from downspouts shall be transported to the street through a satisfactory water collection system." All suggest landscaping attributes with reference to a residence.

Furthermore, the drafters of the CC & Rs, i.e., Pacific, clearly contemplated landscaping of completed residences, not landscaping of vacant custom home lots before they were built upon. When the CC & Rs were drafted and recorded, Pacific planned on only selling lots with completed houses. There was uncontroverted expert testimony the

language of section 3.2 was common and appropriate in developments where completed homes were sold. But it was not appropriate in developments where custom home lots are sold and where the home must be constructed before landscaping could be installed.

Nothing in the CC & Rs suggests, as the Association claims, Pacific intended to impose the landscaping requirement on all lots "developed or undeveloped." The Association points to a recital in the CC & Rs in which Pacific stated it "intends (without being obligated to do so) to later develop" certain additional property, including specifically the Troon Drive property, and the additional property would be annexed to the CC & Rs. The Association argues this demonstrates Pacific anticipated some lots would not be "fully developed" but intended they would nonetheless be subject to the landscaping requirement. We disagree. The option Pacific was leaving open was whether to bring the additional property into the One Ford Road development at all. Pacific still plainly envisioned if the additional property was made part of One Ford Road, it was going to develop the lots prior to selling them. This is borne out by the recorded annexation document that stated Pacific, "has improved or intends to improve the Lots within the Annexed Property with residential structures and customary amenities for which such lots are intended to be used." Markley testified it was not until *after* annexing the Troon Drive lots that Pacific decided to sell them as vacant custom home sites.

Additionally, the timing requirements of section 3.2 of the CC&Rs support the conclusion it contemplates installation of landscaping around a completed house, not upon a vacant custom home site. Section 3.2 requires submission of landscaping plans within 90 days of the date the lot was conveyed and completion of landscaping within at most 180 days. But it would be wholly unrealistic to envision construction of a large custom home being completed before that time ran out. Indeed, we note the grant deeds for the other five Troon Drive custom lots that contained a restriction on when construction must commence, allowed 18 months from conveyance of title to commence

construction and 48 months to complete construction. The interpretation of section 3.2 urged by the Association would lead to an absurd result. The owner of the vacant lot would be required to fully landscape it *prior* to construction of a residence, demolish the landscaping for construction, and then reinstall it upon completion of the residence.

Finally, the Association's past actions with regard to the Subject Lot and other Troon Drive custom home sites demonstrates it too interpreted section 3.2's landscaping requirement as not applying until a residence was built. (*City of Hope, supra,* 43 Cal.4th at p. 393 [evidence of party's conduct admissible to interpret contract].) The uncontroverted evidence was that no other custom home site was required to install landscaping prior to completion of a residence thereon. Indeed, the Subject Lot sat vacant for five years and had three different owners before being purchased by Fudge. None of those prior property owners ever submitted building or landscaping plans to the Association and none were ever required to.

The Association relies upon *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345 (*Citizens*), and *Nahrstedt, supra*, 8 Cal.4th 361, for the proposition that while CC & Rs are *interpreted* as contracts, their *enforceability* is governed by the law of equitable servitudes. It urges the CC & Rs must be enforced uniformly, unless unreasonable, so as to fulfill the reasonable expectations of the community as a whole. The Association argues other property owners purchased in One Ford Road with the expectation that all lots in the development would be fully landscaped within a reasonable amount of time.

Citizens and *Nahrstedt* involve different circumstances. Both were cases considering enforceability of recorded CC & Rs against the property owner, not interpretation of the CC & Rs. In *Nahrstedt*, plaintiff sought to prevent enforcement of the CC & Rs prohibition against pets, claiming she was unaware of the restriction when she moved in and the pet restriction was "unreasonable" as to her three indoor cats. The Supreme Court held the recorded use restriction was enforceable unless it was wholly

arbitrary, violated a fundamental public policy, or imposed a burden that far outweighs any benefit. (*Nahrstedt, supra,* 8 Cal.4th at p. 389.) In *Citizens*, the court held defendant property owners were bound by use restrictions in CC & Rs recorded before any individual parcels in the subdivision were sold, even though there was no reference to them in the individual deeds or other documents provided at the time of sale. (*Citizens, supra,* 12 Cal.4th at p. 368.)

Here, there is no question the Subject Lot is bound by the recorded CC & Rs. The issue here revolves around the reasonable interpretation of section 3.2's landscaping requirement. The Association asserts comments by the trial court in its statement of decision regarding the "applicability" of section 3.2 to the Subject Lot (i.e., its conclusion "[s]ection 3.2 of the CC & Rs is inapplicable to the Subject Lot"), demonstrates the issue here is one of enforceability of the CC & Rs, not interpretation. But given our de novo standard of review (*Ekstrom, supra,* 168 Cal.App.4th at p. 1121), we are not bound by any particular language the trial court used in ruling.

We do not agree with the Association's assertion the underlying purpose of section 3.2 of the CC&Rs, and reasonable expectation of other property owners, was that "no lot in the development remain fallow indefinitely" and thus would be fully landscaped within six months of conveyance of title. As already noted the CC & Rs were premised upon an original development plan of selling fully built homes. Thus, the new home purchasers' reasonable expectation had nothing to do with the presence of vacant lots, but with the presence of unlandscaped houses. The CC & Rs contained no construction deadlines applicable to vacant lots. And while the deeds to the other Troon Drive custom home lots contained construction deadlines of four years after conveyance, no similar restriction was included in the deed to the Subject Lot. The Association cannot use the landscaping provision to shoehorn a construction deadline onto a lot that was not otherwise restricted. (*Hannula, supra,* 34 Cal.2d at pp. 444-445 ["Restrictions on the use of land will not be read into a restrictive covenant by implication . . ."].)

Finally, we do not agree with the Association that section 3.2's landscaping requirement is the only mechanism to protect other One Ford Road property owners from detriment they might suffer due to presence of a vacant lot in the development. Section 2.13 of the CC & Rs provides, "No weeds, rubbish, debris, objects or materials of any kind shall be placed or permitted to accumulate upon any portion of the Property, which render such portion unsanitary, unsightly, offensive or detrimental to any property in the vicinity thereof or to the occupants of any such property in such vicinity." Section 2.12 of the CC & Rs prohibits maintaining nuisances on any property. Thus, the CC & Rs provide other specific means by which the Association can require a property owner to address the legitimate concerns of other property owners, without requiring he in essence develop and maintain a pocket park on his property until his building plans go forward.

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.